92-1155

Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

October Term, 1992

INDIANA DEPARTMENT OF FINANCIAL INSTITUTIONS, CHARLES W. PHILLIPS, as Director of the Indiana Department of Financial Institutions and Individually, and, JOHN E. SIMMONDS, as Deputy Director of the Indiana Department of Financial Institutions, and Individually.

Petitioners,

v.

ROBERT L. MILLER, and MARK R. MCCAMMON

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Seventh Circuit, in a question of first impression, erroneously decided a question of Indiana law that employees of the Indiana Department of Financial Institutions had a protectible property interest to which due process rights attached in their employment with the Indiana Department of Financial Institutions, a state agency.

LIST OF PARTIES

The Parties to this Petition are Petitioners, Indiana Department of Financial Institutions, Charles W. Phillips, as Director of the Indiana Department of Financial Institutions, and Individually, John E. Simmonds, as Deputy Director of the Indiana Department of Financial Institutions, and Individually, Robert L. Miller, and Mark R. McCammon.

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No. ____

IN THE

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INDIANA DEPARTMENT OF FINANCIAL INSTITUTIONS, CHARLES W. PHILLIPS, as Director of the Indiana Department of Financial Institutions and Individually, and, JOHN E. SIMMONDS, as Deputy Director of the Indiana Department of Financial Institutions, and Individually.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Indiana Department of Financial Institutions, Charles W. Phillips, and John E. Simmonds, respectfully pray the Court issue a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Seventh Circuit (hereinafter the "Seventh Circuit") entered in Case Numbers 91-3736 and 91-3737 on September l, 1992, the petition for rehearing and suggestion of rehearing in banc having been denied October 7, 1992. The Seventh Circuit reversed and remanded this cause to the United States District Court for the Southern District of Indiana with instructions that the Court determine whether the State afforded Miller and McCammon adequate notice and pre-deprivation procedures prior to their dismissals.

OPINIONS BELOW

The decision of the Seventh Circuit denying Petitioners' request for rehearing and suggestion of rehearing *in banc* was issued on October 7, 1992. A copy of that Order has been included in the appendix at page 1a. The decision of the Seventh Circuit reversing and remanding this cause to the District Court was issued on September 1, 1992. A copy of the Seventh Circuit's opinion is included in the appendix at page 2a. The Decision of the District Court regarding Robert Miller was issued on November 15, 1991, and is included in the appendix at page 13a. The Decision of the District Court regarding Mark R. McCammon was issued on October 24, 1991, and is included in the appendix at page 25a.

JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254 and Rule 13 of this Court. The decision of the Seventh Circuit was entered on September 1, 1992. This decision was reviewed on October 7, 1992, when the Seventh Circuit denied Petitioners' Petition for Rehearing and Suggestion of Rehearing In Banc. This petition is timely filed in that it is filed prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. §2101(c) and Rule 13.4, Rules of the Supreme Court of the United States, as measured from the issuance of the denial of Petitioners' Petition for Rehearing and Suggestion of Rehearing In Banc as provided by Rule 20.4 Rules of the Supreme Court of the United States.

STATUTORY PROVISIONS

Ind. Code § 28-1-2-14:

The director shall appoint such deputies, assistants and

other employees as may be found necessary to carry on the work of the department. Except as hereinafter otherwise provided, the several deputies, assistants and employees shall be chosen for their fitness, either professional or practical as the nature of the position may require, irrespective of their political beliefs or affiliations. The technical or professional qualification of any applicant shall be determined by examination, professional rating or otherwise, as the director, in his discretion, may determine. In so far as may be practicable, the examiners shall be so appointed that not more than one-half (1/2) of the examiners shall be adherents of an one political party.

Ind. Code § 28-1-2-15:

Subject to the approval of the state budget agency, the salaries of the supervisors, examiners, assistants, and other employees shall be fixed by the members with the approval of the governor, and all such salaries shall he paid out of the financial institutions fund, as provided for in section 34 of this chapter. Any of the supervisors, examiners, assistants, or employees assigned to or employed in any division of the department or employed by the department may be removed, at any time, by the members with the approval of the governor for inefficiency, incompetency, or neglect of or failure to perform their duties.

Ind. Code § 28-11-2-5:

(a) An employee of the department may be discharged at any time by the director for just cause.

(b) An employee discharged under subsection (a) may request the members to review the director's action. If an employee requests review under this subsection, the members shall review the discharge.

(c) If the members find that the discharge was not for just cause, the employee shall be reinstated and given other appropriate relief by the members.

STATEMENT OF THE CASE

A. Nature of the Case

Respondents brought these actions pursuant to 42 U.S.C. § 1983, seeking redress for the termination of their employment with the Indiana Department of Financial Institutions. Respondents argued that they were denied due process when they were terminated.

The District Court found that Respondents did not have a protectible property interest in their employment to which due process rights attached. The District Court, therefore, dismissed Respondents' suits.

The Seventh Circuit, on appeal by the Respondents, reversed the decision of the District Court on the Grounds that the Respondents did have a protectible property interest in their employment. The Seventh Circuit remanded the cases back to the District Court for a determination of whether the Indiana Department of Financial Institutions afforded Respondents constitutionally adequate notice and pre-deprivation procedures prior to their dismissals.

B. Facts

Respondents, are a former employees of the Indiana Department of Financial Institutions ("Department"). The Department is an agency of the State of Indiana. On July 30, 1990, Respondents were requested to attend a "accreditation meeting" the following day. The purpose of that meeting was to question Respondents regarding discrepancies in their

timekeeping that had been discovered. However, Respondents were not informed of that reason on July 30, 1990, since a number of other employees were involved in the discrepancies and the Department did not wish to allow them an opportunity to prepare a common story.

On July 31, 1990, Respondents separately met with Charles Phillips, the Director of the Department and John Simmonds, the Deputy Director of the Department, and Chuck Stumpf, an other Department employee. At the meetings, Respondents were questioned about falsifying time sheets. At the end of the meetings, Respondents were suspended without pay effective the following day.

At the regular meeting of the Members of the Department, on August 9, 1990, the Members authorized Mr. Phillips to take further action against all personnel charged in the investigation regarding falsifying of time sheets including Respondents. Respondents were notified on August 10, 1990, that their employment was terminated effective August 17, 1990 .

REASON FOR ALLOWANCE OF THE WRIT

The Seventh Circuit Mistakenly Decided A Question Of First Impression In Indiana By Holding That Employees Of The Department Were Not Employees At Will Under The Former Statute

The granting of a writ of certiorari in this case is necessary to decide a question of first impression in Indiana. That question is whether employees of the Indiana Department of Financial Institutions were employees at will under the former statute.

A public employee is entitled to due process prior to dismissal when the public employee has a property interest in continued employment. *Board of Regents v. Roth*, 408 U.S. 564

(1972); *Cleveland Board of Education v. Loudermill, et al.*, 470 U.S. 532 (1985). Here, Respondents did not have such a property interest.

The statutory authority that provides for employees of the Department of Financial Institutions ("Department") is found in Ind. Code §§ 28-1-2-14 and 28-1-2-15. These statutes read as follows:

Ind. Code § 28-1-2-14:

> The director shall appoint such deputies, assistants and other employees as may be found necessary to carry on the work of the department. Except as hereinafter otherwise provided, the several deputies, assistants and employees shall be chosen for their fitness, either professional or practical as the nature of the position may require, irrespective of their political beliefs or affiliations. The technical or professional qualification of any applicant shall be determined by examination, professional rating or otherwise, as the director, in his discretion, may determine. In so far as may be practicable, the examiners shall be so appointed that not more than one-half (1/2) of the examiners shall be adherents of an one political party.

Ind. Code § 28-1-2-15:

> Subject to the approval of the state budget agency, the salaries of the supervisors, examiners, assistants, and other employees shall be fixed by the members with the approval of the governor, and all such salaries shall be paid out of the financial institutions fund, as provided for in section 34 of this chapter. Any of the supervisors, examiners, assistants, or employees assigned to or employed in any division of the department or employed by the department may be removed, at any time, by the members with the approval of the governor for inefficiency, incompetency, or neglect of or failure to perform their duties.

In the case of *Bishop v. Wood*, 426 U.S. 341 (1976), the United States Supreme Court held that an ordinance that provided that a police officer may be discharged for failure to perform work up to the standard of his classification or if he was negligent, inefficient, or unfit to perform his duties did not necessarily create a right to continued employment. The Court held:

> ... However, such a reading is not the only possible interpretation; the ordinance may also be construed as granting no right to continued employment but merely conditioning an employee's removal on compliance with certain specified procedures.

426 U.S. at 345.

Although no Indiana Court has interpreted Ind. Code §§ 28-1-2-14 and 28-1-2-15, the Indiana Court of Appeals has interpreted a similar statute in the case of *Phegley v. Indiana Department of Highways*, 564 N.E.2d 291 (Ind.App. 1990). In that case, the Indiana Court of Appeals held that employees of the Indiana Department of Highways were non-merit employees for the purposes of demotion or dismissal. Even though the director's discretion to demote or dismiss was restricted by statute, the Court specifically held that Phegley was an employee at will, demotable for any reason or no reason at all.

Similarly, Respondents, as any other employees of the Department, are employees at will. Their employment, governed by Ind. Code §§ 28-1-2-14 and 28-1-2-15, is not a property right that has been granted to them. Rather, like in *Phegley* and *Bishop*, they are at will employees with statutory conditions attached to their employment.

Respondents' argument that the holding in *Phegley* is lessened by the Indiana Supreme Court's holdings in *Indiana Department of Highways v. Pigg*, 580 N.E.2d 673 (Ind. 1991) and *Indiana Department of Highways v. Dixon*, 541 N.E.2d 877 (Ind. 1989), is unpersuasive. In each case, the Indiana Supreme Court

recognized that the employee was an employee at will. Those cases held that the employee had a right to judicial review under Indiana's Administrative Adjudication Act which allowed for judicial review of an agency decision if the petition for review was filed within fifteen (15) days after receipt of notice of the agency's decision. This review, it should be noted, does not precede the termination of employment, rather it is allowed after the termination of employment. Further, *Dixon* relied heavily upon the employee's right to free speech. Therefore, neither *Pigg* nor *Dixon* support Respondents' argument that he is not an employee at will.

Similarly, Respondents' argument and the panel's decision holding that the replacement of Ind. Code § 28-1-2-15 with Ind. Code § 28-11-2-5 indicates the legislature's intent that employees of the Department are not employees at will is misplaced. Ind. Code § 28-11-2-5 reads as follows:

> (a) An employee of the department may be discharged at any time by the director for just cause.
>
> (b) An employee discharged under subsection (a) may request the members to review the director's action. If an employee requests review under this subsection, the members shall review the discharge.
>
> (c) If the members find that the discharge was not for just cause, the employee shall be reinstated and given other appropriate relief by the members.

The argument that this 1991 change in the statute clarifies that Respondents may only have been discharged or just cause ignores Indiana law.

In Indiana, the amendment of a statute, absent clear intent to the contrary, raises the presumption that the Legislature intended to change the law. *Pierce Governor Company v. Review Board of the Indiana Employment Security Division*, 426 N.E.2d 700 (Ind.App. 1981); *H. W. K. v. M. A. G.*, 426 N.E.2d 129 (Ind.App. 1981); *Van Orman v. State*, 416 N.E.2d 1301 (Ind. App. 1981). Therefore the addition of the language "for just

cause" indicates a change in the law. This further supports the proposition that Respondents, in this case were employees at will without any protectible property right in their employment.

The Seventh Circuit discounted the Petitioners' reliance on *Bishop v. Wood*, supra., since the Seventh Circuit understood that *Bishop* relied heavily upon the appellate courts giving deference to the district courts in deciding matters of state law. However, deference to the district court's decision is not the issue in this case, the interpretation of Indiana law is. The Appellate Court, although not required to defer to the district court, still must decide the question of what rights apply by an interpretation of state law. *Salve Regina College v. Russell*, ___ U.S. ___, 111 S.Ct. 1217 (1991); *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251 (7th Cir. 1985); *Smulski v. Conley*, 435 F.Supp. 770 (N.D. Ind. 1977).

Also, the Seventh Circuit's reliance upon *Smulski* is misplaced. The ordinance in question in *Smulski* had much stronger wording than the statute in this case. Further, Smulski was decided prior to the Indiana courts decisions in *Phegley v. Indiana Department of Highways, supra; Indiana Department of Highways v. Dixon, supra*; and *Indiana Department of Highways v. Pigg, supra*. As discussed above, those three Indiana cases support the Petitioners' argument that the statute under which Respondents were employed was an at will statute.

Respondents were employees at will. As such, they are not afforded pre termination procedural rights.

CONCLUSION

The Seventh Circuit Court of Appeals determining that Respondents had a protectible property interest in their employment with the Indiana Department of Financial Institutions. This is an important decision of law that had not been settled by the Indiana Courts. For the foregoing reasons, the

Petitioners, Indiana Department of Financial Institutions, Charles W. Phillips and John E. Simmonds pray the Court grant this Petition for Writ of Certiorari to review the decision of the Seventh Circuit.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

TERRY G. DUGA
Deputy Attorney General

APPENDIX

UNITED STATES COURT of APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

October 7, 1992

Before

Hon. JOEL M. FLAUM, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. JESSE E. ESCHBACH, Senior Circuit Judge

MARK R. McCAMMON, ROBERT L. MILLER, *Plaintiffs-Appellants,*	)	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
Nos. 91-3736 and 91-3737 v.	)	
INDIANA DEPARTMENT OF FINANCIAL INSTITUTIONS, CHARLES W. PHILLIPS, Individually and as Director of the Indiana Department of Financial Institutions, *Respondent-Appellee.*	)	No. 90 C 1832 **John D. Tinder,** *Judge.* No. 91 C 127 **John D. Tinder,** *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause on September 15, 1992, by defendants-appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 91-3736 & 91-3737
MARK R. McCAMMON,

Plaintiff-Appellant,

v.

INDIANA DEPARTMENT OF FINANCIAL INSTITUTIONS, CHARLES W. PHILLIPS, as Director of the Indiana Department of Financial Institutions and individually, and JOHN E. SIMMONDS, as Deputy Director of the Indiana Department of Financial Institutions and individually,

Defendants-Appellees.

ROBERT L. MILLER,

Plaintiff-Appellant,

v.

INDIANA DEPARTMENT OF FINANCIAL INSTITUTIONS, CHARLES W. PHILLIPS, as Director of the Indiana Department of Financial Institutions and individually, and JOHN E. SIMMONDS, as Deputy Director of the Indiana Department of Financial Institutions and individually,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division.
Nos. IP 91-127-C & IP 90-1832-C- **John D. Tinder**, *Judge.*

ARGUED MAY 19, 1992 - DECIDED SEPTEMBER 1, 1992

Before FLAUM and RIPPLE, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

FLAUM, *Circuit Judge.* The sole issue presented in this consolidated appeal brought under 42 U.S.C. § 1983 is whether appellants Mark McCammon and Robert Miller had a protectible property interest to which due process rights attached in their employment with the Indiana Department of Financial Institutions (Department), a state agency. The district court held that they did not, and we reverse.

Until their dismissals on August 17, 1990, McCammon and Miller were employed within the Department as compliance field examiners. McCammon had worked there since 1979, and Miller since 1984. In a telephone conversation on July 30, 1990, John Simmonds, deputy director of the Department, notified Miller that he was to attend an "accreditation meeting" the next day. He did not inform Miller that he would be questioned about his timekeeping records. Simmonds telephoned McCammon the following morning, and conveyed essentially the same information. Later that day Simmonds, along with Department Director Charles Phillips and another Department employee, Chuck Stumpf, held separate meetings with McCammon and Miller.

Unbeknownst to the appellants, the Department had conducted an investigation in early 1990 to determine whether certain examiners were falsifying the time sheets by which they accounted for time spent on their jobs. As part of the investigation, verification forms were sent to companies that had been examined by Department employees.

The July 31 meetings addressed certain discrepancies between the appellants' neither of whom had brought their personal records to the meetings, were unable to account for the discrepancies or to provide specific explanations. At the conclusion of the meetings, Phillips issued letter to McCammon and Miller, suspending them without pay effective the following day. About a week without pay effective the following day. About a week later, at their regular meeting on August 9, the members of the Department authorized Phillips to take further action against all personnel charged in the investigation, including McCammon and Miller. Both men were notified the following day that their employment was terminated, effective August 17.

McCammon and Miller contend that they had a property interest in their positions as financial examiners, and that the Department's actions deprived them of the fourteenth amendment procedural due process protections to which they were entitled. In the alternative, maintain that even absent such a statutorily defined interest, the conduct of the Department in holding nominal pre-deprivation hearings with the two men supports a finding of a mutually explicit understanding of a protected interest.

At the time McCammon and Miller were terminated from the Department, the statue governing their dismissals read as follows:

> Any of the supervisors, examiners, assistants, or employees assigned to or employed in any division of the department *may be removed*, at any time, by the members with the approval of the governor *for inefficiency, incompetency, or neglect of or failure to perform their duties.*

Ind. Code § 28-1-2-15 (1986) (repealed 1991) (emphasis added). In finding that this provision did not grant the appellants a property interest in their jobs, the district court first noted that "[t]he ordinary meaning of the phrase 'at any

time' suggests that employees can be dismissed at the discretion of the members." *Miller v. Indiana Dep't of Fin. Inst.*, No. IP 90-1832-C, slip op. at 11 (S.D. Ind. Nov. 15, 1991); *McCammon v. Indiana Dep't of Fin. Inst.*, No. IP 91-127-C, slip op. at 14 (S.D. Ind. Oct. 24, 1991). The court further reasoned that since Indiana common law considers all employees to serve "at will," the state would be "in derogation of common law if interpreted as providing a property interest in employment." *Miller*, slip op. at 11 (citing *Northern Indiana Public Serv. Co. v. Citizens Action Coalition*, 548 N.E.2d 153, 159 (Ind. 1989)); *McCammon*, slip op. at 14 (citing same). According to the court, under Indiana law the legislature makes changes in the common law only by express declaration or unmistakable implication–and neither were present in the provision at issue.

The district court concluded that the provision merely "protects employees of the Department from dismissal to the extent that it does not allow their dismissal without the approval of the members of the Department." *Miller*, slip op. at 11; *McCammon*, slip op. at 14. Since the members here had allocated that authority to Phillips, the court held, the Department had complied with the statute and the appellants failed to establish a property interest. We review *de novo* the district court's interpretation of state law, *Salve Regina College v. Russell*, 111 S. Ct. 1217, 1221 (1991), and respectfully disagree with its determination.

It is well established that a claim of an entitlement to property must be "more than an 'abstract need or desire' or a mere expectation on the part of the individual." *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1262 (7th Cir. 1985) (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). Rather, "it is a claim 'on which people rely in their daily lives' and may be created 'by existing rules or understandings that stem from an independent source such as state law.' " *Id.* (quoting *Roth*, 408 U.S. at 577). Although a state legislature is by no means compelled to

create a property interest in civil service jobs, once it chooses to do so, the constitutional right to due process attaches. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). Public employees subject to dismissal only for just cause are entitled to oral or written notice of the charges against them, an explanation of the employer's evidence, and an opportunity to present their side of the story prior to their discharge. *Patkus*, 769 F.2d at 1265 (citing *Loudermill*, 470 U.S. at 542-48).

McCammon and Miller contend that the plain language of § 28-1-2-15 granted them an entitlement to continued employment. The statute explicitly listed three specific causes for dismissal ("inefficiency, incompetency, and neglect of or failure to perform their duties"), which, they argue, means that the Department could not remove them for other, nonlisted reasons. In support of their argument, the appellants quote the traditional maxim, "expressio unius est exclusio alterius" – *i.e.*, "[w]hen certain items or words are specified or enumerated in a statute then, by implication, other items or words not so specified or enumerated are excluded." *Health & Hosp. Corp. v. Marion County*, 470 N.E.2d 1348, 1355 (Ind. Ct. App. 1984) (citing C.D. Sands, 2A *Sutherland Statutory Construction* § 47.23); *see also Common Council of Peru v. Peru Daily Tribune, Inc.*, 440 N.E.2d 726 (Ind. Ct. App. 1982). Under this reasoning, the fact that certain causes for dismissal are listed by implication excludes any other basis for dismissal. They maintain that to conclude otherwise "would do violence" to the language of the provision, because "[i]t would then be necessary to read the statute as '. . . may be removed . . . for inefficiency, incompetency, or neglect of or failure to perform their duties [*or for any other reason, or for no reason at all*]." McCammon's Br. at 5-6 (emphasis in original); Miller's Br. at 5 (same).

To buttress this contention, McCammon and Miller refer us to *Smulski v. Conley*, 435 F. Supp. 770 (N.D. Ind. 1977). There, the court interpreted a city ordinance providing that

police officers "who have been appointed permanently to the police department *may* be discharged or suspended without pay, demoted or reduced in rank or fined for any of the following reasons . . . [listing reasons]." *Id.* at 773 (emphasis added). The defendants had argued that the word "may" indicated that the listed reasons for discharge were non-exclusive. The court disagreed, finding that the discretionary language merely gave the employer the option to choose what type of disciplinary action, from among those listed, to impose. The court reasoned that if the defendants' interpretation were accepted, the provision listing specific bases for disciplinary action would be rendered meaningless: "There would be little sense in setting forth reasons for demotion if the [employer] could choose a reason not enumerated on which to base its determination to take disciplinary action." *Id.* at 773-74. McCammon and Miller argue that the same logic applies here. Further, they contend, the word "may" in the phrase "may be removed," like the word "may" in *Smulski*, merely means that the Department is statutorily given the discretion to remove an employee for any one of the three listed causes.

The Department responds with scant briefs which only barely satisfy the strictures of Fed. R. App. P. 28. The meager nine- and ten-page briefs each include a Statement of Facts consisting entirely of a single-spaced verbatim block quote from the district court's opinions. Virtually a full page of each "Argument" section contains full block quotes of the relevant statutory provisions, thus leaving a total of five pages to enlighten this court on the issues, only four of which contain substantive arguments. From this sparse material, the Department offers two case analogies, which it claims support a finding of at-will employment here, and one substantive statutory argument.

The Department first relies upon *Bishop v. Wood*, 426 U.S. 341 (1976). *Bishop* involved a city ordinance that provided, in relevant part, "If a permanent employee fails to

perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties, he may be dismissed by the City Manager." 426 U.S. at 344 n.5. Based on its understanding of state law, the district court had concluded that the employee had no protected property interest in the position. *Id.* at 345. The Supreme Court affirmed that determination, noting that although on its face the ordinance "may fairly be read as conferring" a guarantee of continued public employment, *id.*, "such a reading is not the only possible interpretation; the ordinance may also be construed as granting no right to continued employment but merely conditioning an employee's removal on compliance with certain specified procedures." *Id.*

Latching on to this reasoning, the Department argues that because the Court construed the *Bishop* ordinance as merely conditioning a right to removal on procedural compliance, the instant ordinance should likewise be interpreted. The Department overlooks, however, that *Bishop* apparently was based largely the principle of deference to the district court's interpretation of state law (a principle which, we note, the Court has since abolished. *See Salve Regina College*, 1111 S. Ct. at 1221). After noting, for example, that the district court's construction of the statute was upheld by the Fourth Circuit, "albeit by an equally divided court," the Court observed that it had in comparable circumstances "accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred *even if an examination of the state-law issue without such guidance might have justified a different conclusion.*" *Id.* at 345-46 & n.10 (citing cases) (emphasis added). While the Court acceded to the district court's interpretation, it did so with the explicit caveat, noted above, that the ordinance also could "fairly be read" as conferring a property right in continued employment.

Moreover, we also note that the district court in *Smulski* discounted the defendants' reliance on *Bishop* largely for the reasons noted above – the Supreme Court's reliance on state law, its deference to the district court's interpretation, and the Court's observation that the ordinance on its face could be read to confer a property right – concluding, "It is clear then that the mere fact that a Marion, North Carolina, ordinance was not found to create a property interest in a policeman's employment [in Bishop] is not dispositive of a similar question concerning a Hammond, Indiana, ordinance." *Id.* at 774. The Department failed to inform us (although, we note with interest, neither did the appellants) of the fact that *Smulski* explicitly distanced itself from Bishop; indeed, despite *Smulski*'s relevance here, and the appellants' reliance on the case in their briefs, the Department's briefs offered no reference or citation to Smulski whatsoever.

The Department also refers us to *Phegley v. Indiana Department of Highways*, 564 N.E.2d 291 (Ind. Ct. App. 1990), which addressed a statute containing the following language: "cause for demotion, dismissal, discipline, or transfer may include *but is not limited* to failure to satisfactorily effectuate the department's transportation plan and work programs." *Id.* at 294 (emphasis added). Although the court held that the plaintiff in *Phegley* was an at-will employee, we believe this case actually provides support for the appellants' position; as McCammon and Miller correctly observe, it is the specific language of nonlimitation, emphasized above, that prevents the provision at issue in *Phegley* from being subject to any implied exclusivity such as that found in the *Smulski* statute. If anything, *Phegley* illustrates that had the legislature here intended to make the causes for dismissal of Department employees non-exclusive, it knew how to draft a statute accordingly. Although at argument the Department maintained that the legislature likewise knows how to use words of exclusivity, it provided no tangible examples of statutes containing such language

either at argument or in its brief. Thus, that the legislature failed to use non-limitation language (such as that in *Phegley*) in drafting § 28-1-2-15, militates against finding that the causes were non-exclusive in the instant case.

The Department finally argues that the Indiana legislature's subsequent amendment of the relevant provision to explicitly require cause for dismissal, *see* Ind. Code. § 28-11-2-5 ("An employee of the department may be discharged at any time by the director for just cause") (effective July 1, 1991), indicates that the version in effect at the time McCammon and Miller were fired merely established an at-will employment relation which created no protected property interest. According to the Department, this view is supported by the Indiana rule of statutory construction that the amendment of a statute, absent clear intent to the contrary, raises the presumption that the legislature intended to change the law. *See K. v. G.*, 426 N.E.2d 129, 134 (Ind. Ct. App. 1981); *Van Orman v. State*, 416 N.E.2d 1301, 1305 (Ind. Ct. App. 1981). The amendment adding the "just cause" language, the Department contends, raises the presumption that the legislature intended to change the law to establish a property right in Department employment, thereby indicating that the previous provision created only an at-will relationship. McCammon and Miller counter that the two versions of the provision are "functional equivalents" – that is, the "for just cause" language in the current version effectuates the same purpose as the "for the following causes" language preceding the listed reasons for dismissal in the prior version. They also note that the phrase "at any time" is retained in the amended statute, thus calling into question the district court's observation that this phrase in the prior version implied at-will employment.

Despite the general presumption cited by the Department, we believe that in this case the legislature amended the statute to clarify, rather than alter, existing law. *See Van Orman*, 416 N.E.2d at 1305 (quoting *Indiana Dep't of State Revenue, Sales Tax Div. v. Cable of Brazil, Inc.*, 380

N.E.2d 555, 559-60 (Ind. App. 1978)). In interpreting the statute, we "must ascertain the legislative intent by looking at the whole of the act." *Van Orman*, 416 N.E.2d at 1305; *see Evansville v. International Ass'n of Fire Fighters, Local 357*, 516 N.E.2d 57, 60 (Ind. 1987). "We must examine the law existing before, the changes made and the apparent intent for making the changes." *Van Orman*, 416 N.E.2d at 1305. Here, during the relevant period, the statute at issue also contained a provision controlling the *hiring* of Department employees:

> The director shall appoint such deputies, assistants and other employees as may be found necessary to carry on the work of the department. Except as hereinafter otherwise provided, the several deputies, assistants and other employees *shall be chosen for their fitness*, either professional or practical as the nature of the position may require, *irrespective of their political beliefs or affiliations*. The technical or professional qualification of any applicant shall be determined by examination, professional rating or otherwise, as the director, in his discretion, may determine. In so far as may be practicable, the *examiners shall be so appointed that not more than one-half (1/2) of the examiners shall be adherents of any one political party*.

Ind. Code. § 28-1-2-14 (1986) (repealed 1991) (emphasis added). In construing the statute in effect during the relevant time period in its entirety, we find that the policy decision to insulate bank examiners from politics at the front end (*i.e.*, hiring) indicates that the legislative intent likewise would be to shield these employees from discretionary political decisions at the back end (*i.e.*, firing), thereby supporting the appellants' contention that the dismissal provision at issue established a protected interest in continued employment. We agree with the appellants that the amended language is functionally equivalent to that in the previous version, and that the language of the statute as a whole, as

well as the nature of the amendment, sufficiently rebuts the presumption. *See K. v. G.*, 426 N.E.2d at 134.

Although at argument the Department proffered additional policy rationales (which, as an original matter, might have some appeal), it again offered no support to back up its claims. The Department maintained, for example, that examiners hold unique and specialized positions; because these positions are closer in line to the chief executive than the typical civil servant, it follows that the positions are more, not less, at-will than those held by the typical civil servant. Given the preceding discussion, however, it is equally as reasonable to speculate that the specialized nature of these positions requires *added* procedural protections. Indeed, a common sense interpretation would indicate that the legislature's intent regarding the hiring and firing provisions should be viewed in the conjunctive; a statute whose aim is to prevent political hiring likewise would embrace the goal of protecting Department employees from political firing.

We find that McCammon and Miller had a protectible property interest in their employment with the Department, and therefore were entitled to constitutionally adequate due process procedures prior to their removal. Given this, we need not address the appellants' argument that the Department's conduct in meeting with the appellants prior to their dismissals constituted recognition of an implied understanding of a protected property interest. We reverse the determination of the district court in regard to both McCammon and Miller, and remand for a determination of whether the Department afforded the appellants constitutionally adequate notice and pre-deprivation procedures prior to their dismissals.

REVERSED AND REMANDED.

UNITED STATES COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ROBERT L. MILLER,	)	
Plaintiff,	)	
	)	
v.	)	IP 90-1832 C
	)	
INDIANA DEPARTMENT OF FINANCIAL INSTITUTIONS, CHARLES W. PHILLIPS, as Director of Financial Institutions and individually, and JOHN E. SIMMONDS, as Deputy Director of the Indiana Department of Financial Institutions, and individually	)	
Defendant.	)	

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

This matter comes before the court on defendants' motion to dismiss. For the reasons stated in the memorandum entry of this date, IT IS ORDERED, ADJUDGED AND DECREED that the motion to dismiss is GRANTED in favor of defendants the Indiana Department of Financial Institutions, Charles W. Phillips, and John E. Simmonds. Plaintiff Miller takes nothing by way of this complaint.

ALL OF WHICH IS ORDERED this 15th day of November, 1991.

/S/ John Daniel Tinder, Judge
United States District Court

UNITED STATES COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ROBERT L. MILLER,	)	
Plaintiff,	)	
	)	
v.	)	IP 90-1832 C
	)	
INDIANA DEPARTMENT OF FINANCIAL INSTITUTIONS, CHARLES W. PHILLIPS, as Director of Financial Institutions and individually, and JOHN E. SIMMONDS, as Deputy Director of the Indiana Department of Financial Institutions, and individually	)	
Defendant.	)	

ENTRY GRANTING DEFENDANT'S MOTION TO DISMISS

I. BACKGROUND

This matter comes before the court on defendants' motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and for failure to state a claim upon which relief can be granted pursuant to Fed. R. civ. P. 12(b)(6). The court does not find it necessary to consider exhibits submitted with defendants' motion to dismiss and therefore will not convert this motion to a summary judgment.

A. Facts

Plaintiff Robert L. Miller, a resident of the state of Indiana, is a former employee of the Indiana Department of Financial Institutions ("Department"). The Department is an agency of the State of Indiana, created pursuant to Ind. Code § 28-1-2-1.[1] Plaintiff Miller was employed by the Department as a work leader/ examiner 2 from April 1, 1964 until August 17, 1990. He was appointed pursuant to Ind. Code § 28-1-2-14 which authorizes the Director of the Department to appoint employees to carry on the work of the Department. The firing of department employees, including work leaders/ examiners such as Miller, is provided for in Ind. Code § 28-1-2-15 which reads as follows:

> Any of the supervisors, examiners, assistants, or employees assigned to or employed in any division of the department or employed by the department may be removed at any time, by the members with the approval of the governor for inefficiency, incompetency, or neglect of or failure to perform their duties.

Defendant Charles W. Phillips ("Phillips") is and was, during the time in which the events at issue occurred, the Director of the Department of Financial Institutions. He works primarily in Indianapolis, the location of the Department's main office. Defendant John E. Simmonds ("Simmonds") is and was, during the time in which the events at issue occurred, the Deputy Director of the Department, also working primarily in the Indianapolis office.

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[1] This statute, along with §§ 28-1-2-14 and 28-1-2-15 were repealed, effective July 1, 1991. These sections have been replaced by §§ 28-11-1-1, et seq., effective July 1, 1991. The court must, however, analyze the issues according to the statutes which were in effect at the time the alleged deprivation occurred.

Defendant Simmonds notified plaintiff Miller by telephone on the afternoon of July 30, 1991 that his presence was necessary at an "accreditation meeting" the following day. Simmonds did not inform Miller that he would be questioned about his timekeeping records at the meeting and told Miller when asked that Miller did not need to prepare anything for the meeting. Defendants claim this was because they did not want to allow him and other employees being questioned time to conspire to explain their actions. Plaintiff Miller believes that defendants deliberately deceived him about the nature of the meeting so that he could not prepare to defend himself against the accusations with which they confronted him. On July 31, 1990, defendants Phillips and Simmonds conducted hearing to determine if there was an explanation for the discrepancies between plaintiff's timesheets and the times confirmed by the companies. At the meeting, defendants questioned plaintiff about the time he spent examining different companies, and why there were such large discrepancies between the times he reported and the times the companies confirmed. Miller was unable to recall specifics about many of the examinations because he did not have access to his personal records to refresh his memory. At the end of questioning, defendants presented a letter to Miller which suspended Miller without pay effective the following day.

Following a regular meeting held by the members of the Department, defendants terminated plaintiff Miller's employment on August 10, effective August 17, 1990. Plaintiff Miller claims that defendants, acting under color of state law, deprived him of a property interest in his continued employment, and the income and benefits of his position without notice or an adequate predeprivation hearing, thereby depriving him of due process of law.

B. Standard of Review

For purposes of considering a motion to dismiss under Fed. R. civ. P. 12(b)(1), a court is not restricted to the face of the pleadings, but may review other evidence such as affidavits and testimony to resolve factual disputes concerning the existence of subject matter jurisdiction. *Kontos v. U.S. Department of Labor*, 826 F.2d 573 (7th Cir. 1987). The complaint will be construed broadly and liberally, *Reason v. Heslin*, 723 F.Supp. 1309 (S.D. Ind. 1989), and read as a whole with all uncontroverted factual allegations being taken as true. *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Stern v. U.S. Gypsum. Inc.*, 547 F.2d 1329, (7th Cir. 1977), *cert. denied*, 434 U.S. 975 (1977).

To withstand a 12(b)(6) motion to dismiss, a pleading must meet the standard set forth in Fed. R. civ. P. 8(a)(2) calling for "a short and plain statement of the claim showing that the pleader is entitled to relief." The statement of the claim must give fair notice of its basis and supporting ground. *Conley v. Gibson*, 355 U.S. 41, 47 (1957). The court must review this statement, construing it in favor of the plaintiff and taking all factual allegations in it as true, *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), to determine whether plaintiff has set forth facts supporting a cause of action which would entitle him to relief. *Conley v. Gibson*, 355 U.S. at 45-46; *Beam v. IPCO Corp.*, 838 F.2d 242, 244 (7th Cir. 1988). However, the court is not required to accept legal conclusions, or inferences or allegations unwarranted by the facts as presented in the pleadings. *Implement Service Inc., v. Tecumseh Products Co. et al*, 726 F.Supp. 1171, 1175 (S.D. Ind. 1989).

The accepted standard for determining the sufficiency of the complaint does not permit dismissal "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Conley v. Gibson, 355 U.S. at 45-46. The court cannot dismiss a complaint merely because it doubts that the plaintiff can prove the facts it alleges. *Neitzke v. Williams*, ___ U.S. ___, 109 S.Ct. 1827 (1989). Thus, defendants' motion to dismiss can only be granted if plaintiff has failed to allege sufficient facts to entitle plaintiff to relief if the facts alleged are taken as true. If plaintiff has failed to sufficiently allege any element of a § 1983 claim the motion to dismiss must be granted.

II. DISCUSSION

A. Claims for Damages Against the Department and the Individual Defendants in Their Official Capacities

This court has subject matter jurisdiction of the § 1983 claim pursuant to 28 U.S.C. §§ 1331 and 1343. However, if defendants are able to claim immunity for their actions under the eleventh amendment, the claims must be dismissed, as the eleventh amendment acts as a jurisdictional bar to a suit against a state in federal court. The court must first ask if the suit is in fact against the state. If it is, then the court must ask whether the government body named as defendant is an arm of the state, which is protected by eleventh amendment immunity, or a municipal corporation or political subdivision, neither of which are protected by eleventh amendment immunity. *Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274, 280 (1977).

State agencies are treated as states for purposes of the eleventh amendment. *Kroll v. Board of Trustees of Univ. of Illinois*, 934 F.2d 904, 907 (7th Cir. 1991). Thus, if the Department is a state agency, it is protected by eleventh amendment immunity. The Department of Financial Institutions is created by Ind. Code § 28-1-2-1. Its duties include organizing, supervising, examining and regulating financial institutions organized under the laws of the state of

Indiana. Ind. Code §§ 28-1-1-3 and 28-1-2-1. Its actions are funded by the State and any judgment against it would be satisfied out of the state treasury. Thus, there is no question that the Department is a state agency. A plaintiff cannot seek monetary damages from the state or any arms of the state the liability of which will be paid out of the state treasury, *Kentucky v. Graham*, 473 U.S. 159, 167 n. 14 (1985), unless the state has waived this protection or Congress has validly overridden it. *Hadi v. Horn*, 830 F.2d 779, 783 (7th Cir. 1987). Plaintiff has alleged neither of these events. Thus, all claims against the Department, considered to be an arm of the state, must be dismissed for lack of jurisdiction.

A suit for retrospective relief against a person in his or her official capacity must also be dismissed, as the suit is considered to be against the entity of which the of agent. *Kroll v. Board of Trustees*, 934 F.2d at 907. Defendants Phillips and Simmonds are state employees, and a suit against them in their official capacities is considered to be a suit against the state. Because the state cannot be sued as a matter of sovereign immunity, the motion to dismiss is granted for the claims made for retrospective relief against defendant Phillips in his official capacity, and defendant Simmonds in his official capacity.[2]

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[2] Regardless of eleventh amendment immunity, these particular claims may also be dismissed against defendants who do not qualify as "persons." Personhood is an essential element of a § 1983 claim. A state is not a suable person within the meaning of § 1983, *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), and therefore cannot be sued in its own name. This rule extends to a state agency, or any state official acting in his or her official capacity in a suit for damages, since an action against the agency or official is equivalent to a action against the state itself. *Id.* at 71. The Department is a state agency, created by Ind. Code § 28-1-2-1. This is further evidenced by the provisions of § 28-1-2-15, which allow the members of the Department to fix the salaries for those working in the Department, subject to the approval of the state budget agency and the governor. These salaries are paid out of the financial institutions fund,

(continued . . .)

Neither the eleventh amendment nor *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), bars a suit for prospective relief, such as an order for reinstatement as plaintiff has asked for here, against a state or state official who has allegedly violated the Fourteenth Amendment. *Ex Parte Young*, 209 U.S. 123 (1908); *Kroll v. Board of Trustees*, 934 F.2d at 908. Therefore, the motion to dismiss for lack of subject matter jurisdiction must be denied as to the claim for prospective relief against the Department and the individuals in their official capacities. Furthermore, a state official is not protected from a suit for damages in his or her individual capacity, with any recovery to be obtained from his or her personal assets. *Will*, 491 U.S. at 71 n. 10; *Hadi v. Horn*, 830 F.2d at 782. The court will now turn to the claims against the individual defendants, Phillips and Simmonds, to determine if those claims should be dismissed.

B. Remaining Claims Against Department and Individual Defendants

The Supreme Court specifically allows damages to be sought from an individual defendant who, acting under color of state law, has deprived the plaintiff of a constitutional right. *Scheuer v. Rhodes*, 416 U.S. 232 (1973). Plaintiff has sufficiently alleged facts to show that defendants were acting under color of state law. However, a second essential element of a § 1983 action, whether the conduct complained of deprived a person of constitutionally protected rights, privileges or immunities, must also be established. In this case, the court must decide whether plaintiff had a property interest in continued

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[2] (continued . . .)

created by § 28-1-2-34, which is a part of the state treasury. Thus, the Department's actions and the official actions of its employees are considered those of the state. Therefore, the suit for retrospective relief, or damages, against defendants, the Department, Phillips, and Simmonds, must be dismissed as well for the reason that they are not "persons."

employment with the Department, and if he did, whether he received adequate due process.

A public employee is entitled to due process prior to dismissal when the public employee has a property interest in continued employment. *Board of Regents v. Roth*, 408 U.S. 564 (1972). The public employee may have such an interest despite the lack of a formal contract or tenure. *Perry et al. v. Sindermann*, 408 U.S. 593 (1972). The property interest is established for purposes of due process if there is a mutually explicit understanding, a state law, or some other rule or regulation which supports the claim of entitlement to the benefit. *Id.*

Plaintiff Miller claims that he has a property interest in his position as an work leader/ examiner with the Department based on the language of the statute and that his termination by defendants, acting under color of state law, without adequate notice or hearing, violated his due process rights. Plaintiff has alleged conduct by defendants which, taken in the light most favorable to him, would be sufficient to set forth a constitutional violation if plaintiff had a fourteenth amendment property interest in his position as examiner. However, this court finds that plaintiff did not have a constitutionally protected property interest in his position.

No Indiana cases interpret § 28-1-2-15. Cases interpreting other similar statutes, both in Indiana and elsewhere, have found both that the employee did and did not have a property interest in his or her position, *see, e.g., Bishop v. Wood*, 426 U.S. 341 (1976) (city ordinance providing that a permanent employee could be discharged for certain reasons could be interpreted as either conferring a property right in continued employment or as conditioning an at-will employee's removal on statutory restrictions; the Court followed the latter interpretation, chosen by the district court); *Phegley v. Indiana Department of Highways*, 564 N.E.2d 291 (Ind. Ct. App. 1990) (engineer employed by department was found to be an employee at will where statute allowed demotion or dismissal at any time

subject to certain statutory restrictions). The language of § 28-1-2-15 does not explicitly state that an examiner of the Department may only be dismissed "for cause." It does provide that an examiner may be dismissed "at any time" for "inefficiency, incompetency, or neglect of or failure to perform their duties" by the members of the Department, rather than the director or the employee's direct supervisor.

A comparison of the statute in this case with the statute in *Pheqley* and the one in *Bishop v. Wood* suggests that it falls somewhere between the two. The statute in *Phegley* clearly puts dismissal of employees at the discretion of the director and, while listing acceptable reasons for dismissal, states that such reasons are not limited to those listed, leaving no doubt as to the "at will" status of the employee. In *Bishop v. Wood*, the Supreme Court accepted the interpretation of the district court that the statute in question did not give the employee a property interest in his position but suggested the interpretation could easily have gone the other way. That statute called the plaintiff policeman a "permanent employee" and listed acceptable reasons for dismissal. Because the statute did not explicitly limit dismissal to only those reasons, the district court interpreted the statute as not giving to the policeman a property interest in his employment.

This statute must also therefore be interpreted as not giving the plaintiff employee a property interest in his position. It allows for dismissal at any time with statutory restrictions rather than creating an entitlement to their jobs for the employees it covers. The ordinary meaning of the phrase "at any time" suggests that employees can be dismissed at the discretion of the members. Furthermore, common law considers all employees to be at will. The statute would be in derogation of common law if interpreted as giving plaintiff a property interest in his employment. Legislative deviations from the common law must be expressly declared or unmistakably implied. *Northern Indi-*

ana Public Serv. Co. v. Citizens Action Coalition,-548 N.E.2d 153 (Ind. 1989). This statute does not, as written, expressly declare or unmistakably imply that plaintiff was a permanent employee thereby giving him a property interest in his position as a work leader/ examiner. The statute protects employees of the Department from dismissal to the extent that it does not allow their dismissal without the approval of the members of the Department. Plaintiff's employment with the Department was terminated only after the meeting with defendants and a meeting by the Members of the Department during which the issue was discussed. Thus, defendants complied with the statute. Because plaintiff did not have a property interest in his position, he cannot prove a necessary element of a § 1983 cause of action, that he was deprived of a constitutionally protected property interest.

III. CONCLUSION

For the foregoing reasons, this court will grant the motion to dismiss for lack of subject matter jurisdiction against plaintiff and for defendants the Department and the individual defendants in their official capacities. The court will also grant the motion to dismiss for failure to state a claim against plaintiff as to all remaining claims against the Department and the individual defendants as plaintiff does not have a property interest in his position with the Department.

ALL OF WHICH IS ENTERED THIS 15TH day of November, 1991.

/s/ John Daniel Tinder, Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ROBERT L. MILLER, *Plaintiff-Appellant,* v. INDIANA DEPARTMENT OF FINANCIAL INSTITUTIONS, CHARLES W. PHILLIPS, as Director of the Indiana Department of Financial Institutions and individually, and JOHN E. SIMMONDS, as Deputy Director of the Indiana Department of Financial Institutions, and individually *Defendants-Appellees.*	)	No. 91-3737

On Appeal from the United States District Court
for the Southern District of Indiana
Indianapolis Division
No. IP 90-1832 C -- Hon. John D. Tinder, Judge

PROOF OF SERVICE

I do solemnly affirm under penalties of perjury that on the 10th day of September, 1992, I served upon counsel for the parties in the above-entitled cause two (2) copies of the Appellees' Petition for Rehearing and Suggestion of Rehearing In Banc by depositing same in the United States mail, first class postage prepaid, addressed as follows:

Peter D. Miller
PETER D. MILLER, P.C.
6100 N. Keystone Avenue, Suite 845
Indianapolis, IN 46220

/S/ Terry G. Duga
Deputy Attorney General

Office of Attorney General
219 State louse
Indianapolis, IN 46204-2794
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MARK R. McCAMMON, *Plaintiff,* vs. INDIANA DEPARTMENT OF FINANCIAL INSTITUTIONS, CHARLES W. PHILLIPS, as Director of Financial Institutions and individually, and JOHN E. SIMMONDS, as Deputy Director of the Indiana Department of Financial Institutions, and individually *Defendants.*	)	IP 91-127C

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

This cause came before this court upon the defendants' motion to dismiss or for summary judgment. For the reasons set forth in the memorandum entry of this date, IT-IS ORDERED, ADJUDGED AND DECREED that plaintiff Mark R. McCammon take nothing by way of hi complaint against defendants, the Indiana Department of Financial Institutions, Charles W. Phillips, officially and individually and John E. Simmonds, officially and individually, and that this cause be dismissed.

ALL OF WHICH IS ORDERED this 24th day of October 1991.

/s/ John Daniel Tinder, Judge
United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MARK R. McCAMMON, *Plaintiff,*	)	
	)	IP 91-127C
vs.	)	
INDIANA DEPARTMENT OF FINANCIAL INSTITUTIONS, CHARLES W. PHILLIPS, as Director of Financial Institutions and individually, and JOHN E. SIMMONDS, as Deputy Director of the Indiana Department of Financial Institutions, and individually *Defendants.*	)	

ENTRY GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

This cause comes before the court on defendants' motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and for failure to state a-claim pursuant to Fed. R. Civ. P. 12(b)(6). The latter basis; of the motion to dismiss will be converted to summary judgment if and as necessary in order for the court to consider exhibits and evidence other than the pleadings which the parties have submitted in. support of their arguments.[1] This claim is properly brought before this court pursuant to 42 U.S.C. § 198 and 28 U.S.C. §§ 131 and 1343.

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[1] The court's action is taken pursuant to a Briefing Order by this court dated April 25, 1991, which notifies the parties of the possible conversion from Fed. R. Civ. P. 12(b) (6) motion to dismiss to Fed. R. Civ. P. 56 summary judgment.

I. BACKGROUND

A. Facts

Plaintiff Mark R. McCammon, a resident of the state of Indiana, is a former employee of the Indiana Department of Financial Institutions ("department"). The Department is an agency of the State of Indiana, created pursuant to Ind. Code § 28-1-2-1.[2] The Director of the Department has the power to appoint employees to carry on the work of the Department pursuant to Ind. Code § 28-1-2-14. The firing of department employees, including examiners such as McCammon, is provided for in Ind. Code § 28-1-2-15 which reads as follows:

> Any of the supervisors, examiners, assistants, or employees assigned to or employed in any division of the department or employed by the department may be removed at any time, by the members with the approval of the governor for inefficiency, incompetency, or neglect of or failure to perform their duties.

Defendant Charles W. Phillips ("Phillips") is and was, during the time in which the events at issue occurred, the Director of the Department of Financial Institutions. He works primarily in Indianapolis, the location of the Department's main office. Defendant John E. Simmonds ("Simmonds") is and was, during the time in which the events at issue occurred, the Deputy Director of the Department, also working primarily in the Indianapolis office.

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[2] This statute, along with § § 28-1-2-14 and 28-1-2-15 were repealed, effective July 1, 1991. These sections have been replaced by §§ 28-11-1-1, et seq., effective July 1, 1991. The court must, however, analyze the issues according to the statutes which were in effect at the time the alleged deprivation occurred.

Plaintiff McCammon was employed by the Department as a Compliance Field Examiner from September 10, 1979 until August 17, 1990. He was appointed pursuant to the authority granted in Ind. Code § 28-1-2-14. Defendant Phillips, having been granted the authority by the members of the Department, terminated McCammon's employment with the Department on August 10, 1990, to become effective August 17, 1990. Plaintiff contends that in doing so, Phillips did not comply with Ind. Code § 28-1-2-15, quoted above.

According to a memo dated October 5, 1987, from Tom Beasley, Director of the State Personnel Department, some difficulties had been noted with state employees who were claiming they had worked more hours than they actually had. In other words, some employees were falsifying their time sheet. On October 15, 1987, defendant Simmonds circulated a copy of this memo to all Department employees, along with his own memo reminding them of current Department policies regarding time off. *See* Plaintiff's Supplemental Response, Appendix H.

Defendants conducted an investigation of McCammon and other employees of the Department in an attempt to determine whether they were following the guidelines for completing their time sheets. This investigation was conducted during the months of February, March, and April, 1990. According to an August 13, 1990, memo from defendant Phillips to be placed in the personnel files of the individuals involved, the investigation was conducted by sending verification forms to companies which had been examined by Department employees, including companies which McCammon had examined during those months. The forms requested confirmation of the time spent by the examiner conducting the examination on the premises. Defendant Phillips noted in the August 13 memo that several examiners had time reports which "varied substantially" from the time reports filled out by the companies. McCammon was one of these examiners. In the Department's

summary of time discrepancies,[3] the discrepancies between hours reported by McCammon and hours confirmed by companies ranges from two (2) to five and a half (5 1/2) hours, with some of the hours reported being overstated, some understated. One of the companies confirmed McCammon as being there a full day when he reported only a half day. Another company said he was not there at all. A third company confused him with a person from the Department of Insurance and could not otherwise remember him.

On July 31, 1990, defendant Phillips and his staff conducted pre-deprivation hearings. Defendant Simmonds notified plaintiff McCammon by telephone on the morning of July 1 that he was to be present at an "accreditation meeting." Simmonds did not inform McCammon that he would be questioned about his timekeeping records at the meeting. Defendants claim this was because they did not want to allow him and other employees being questioned time to conspire to explain their actions. Plaintiff McCammon believes that defendants deliberately deceived him about the nature of the meeting so that he could not prepare to defend himself against the accusations with which they confronted him. At the meeting, McCammon was unable to answer brief questions about the time he spent examining five companies because the events had occurred several months prior to the questioning and McCammon did not have access to his personal records to refresh his memory. At the end of questioning, defendant Simmonds presented a letter to McCammon signed by defendant Phillips. The letter suspended McCammon without pay, effective the following day, for "apparent discrepancies in your (McCammon's) work report." *See* Plaintiff's Supplemental Response, Appendix D at 3.

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[3] *See* appendix B of Plaintiff's Supplemental Response.

The members of the Department held a regular meeting on August 9, 1990, during which they allocated authority to defendant Phillips to take appropriate action against all personnel charged, including McCammon.[4] On August 10, 1990, defendant Phillips terminated plaintiff McCammon's employment, effective August 17, 1990. Plaintiff McCammon claims that defendants, acting under color of state law, deprived him of a property interest in his continued employment and the-me and benefits of his position without notice or an appropriate pre-deprivation hearing, thereby depriving him of due process of law.

B. Standard of Review

For purposes of considering a motion to dismiss under Fed. R. Civ. P. 12(b)(1), a court is not restricted to the face of the pleadings, but may review other evidence such as affidavits and testimony to resolve factual disputes concerning the existence of subject matter jurisdiction. *Kontos v. U.S. Department of Labor*, 826 F.2d 573 (7th Cir. 1987). The complaint will be construed broadly and liberally, *Reason v. Heslin*, 723 F.Supp. 1309 (S.D. Ind. 1989), and read as a whole with all uncontroverted factual allegations being taken as true. *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Stern v. U.S. Gypsum. Inc.*, 547 F.2d 1329, (7th Cir. 1977), *cert. denied*, 434 U.S. 975 (1977).

The court must convert a motion to dismiss made pursuant to Fed. R. civ. P. 12(b)(6) into a Fed. R. civ. P. 56 motion for summary judgment whenever materials outside the pleadings are presented to and accepted by the court as part of the challenge to the sufficiency of the complaint. 5A C. Wright A. Miller, Federal Practice and Procedure § 1366 (1990). Defendants and plaintiff have both submitted affidavits, transcripts and other exhibits concerning

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[4] Pursuant to § 28-1-2-1, the members of the Department may delegate their authority to agents or employees of the Department.

McCammon's termination which this court finds it must consider in order to grant or deny this motion, thereby requiring the motion to be converted to one for summary judgment. Rule 56 of the Federal Rules-of civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

When, as in this case, the moving party is the defendant, the movant must establish that there exists no genuine dispute over at least one fact that is essential to the plaintiff's case, and that on the basis of the undisputed fact, no jury could reasonably render a verdict for the plaintiff. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). "Of course, the movant always bears the initial burden of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrates the absence of a genuine issue of material fact." *Id.* at 323. The defendant may meet this burden either by presenting affirmative evidence that disproves an essential element of the plaintiff's case or by showing that the plaintiff lacs evidence sufficient to prove the element. *Id.* 323-25.

If the defendant successfully meets its burden on summary judgment, then the plaintiff cannot avoid an adverse decision by resting upon its pleadings, but must come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 250 (1986). While the court is not free to weigh the evidence, the plaintiff's evidence must be strong enough that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby Inc.*, 477 U.S. at 248. All reasonable inferences are to be drawn

in the light most favorable to the nonmovant. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 47 U.S. 574, 587 (1986); *Schlifke v. Seafirst Corp.*, 866 F.2d 935, 937 (7th Cir. 1989).

II. DISCUSSION

A. Claims Against Department and Individual Defendants in Their Official Capacities

This court has subject matter jurisdiction of the § 1983 claim pursuant to 28 U.S.C. §§ 1331 and 1343. However, if defendants are able to claim immunity for their actions under the eleventh amendment, the claims must be dismissed, as the eleventh amendment acts as a jurisdictional bar to a suit against a state in federal court. The court must first ask if the suit is in fact against the state. If it is, then the court must ask whether the government body named as defendant is an arm of the state, which is protected by eleventh amendment immunity, or a municipal corporation or political subdivision, neither of which are protected by eleventh amendment immunity. *Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274, 280 (1977).

State agencies are treated as states for purposes of the eleventh amendment. *Kroll v. Board of Trustees of Univ. of Illinois*, 934 F.2d 904, 907 (7th Cir. 1991). Thus, if the Department is a state agency, it is protected by eleventh amendment immunity. The Department of Financial Institutions is created by Ind. Code § 28-1-2-1. Its duties include organizing, supervising, examining and regulating financial institutions organized under the laws of the state of Indiana. Ind. Code §§ 28-1-1-3 and 28-1-2-1. Its actions are funded by the State and any judgment against i would be satisfied out of the state treasury. Thus, there is no question that the Department is a state agency. A plaintiff cannot seek monetary damages from the state or any arms of the state the liability of which will be paid out of the state

treasury, *Kentucky v. Graham*, 473 U.S. 159, 167 n. 14 (1985), unless the state has waived this protection or Congress has validly overridden it. *Hadi v. Horn*, 830 F.2d 779, 783 (7th Cir. 1987). Plaintiff has alleged neither of these events. Thus, all claims against the Department, considered to be an arm of the state, must be dismissed for lack of jurisdiction.

A suit for retrospective relief against a person in his or her official capacity must also be dismissed, as the suit is considered to be against the entity of which the officer is an agent. *Kroll v. Board of Trustees*, 934 F.2d at 907. Defendants Phillips and Simmonds are state employees, and a suit against them in their official capacities is considered to be a suit against the state. Because the state cannot be sued as a matter of sovereign immunity, the motion to dismiss is granted for the claims made for retrospective relief against defendant Phillips in his official capacity, and defendant Simmonds in his official capacity.[5]

Neither the eleventh amendment nor *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), bars a suit for

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[5] Regardless of eleventh amendment immunity, these particular claims may also be dismissed against defendants who do not qualify as "persons." Personhood is an essential element of a § 1983 claim. A state is not a suable person within the meaning of § 1983, *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), and therefore cannot be sued in its own name. This rule extends to a state agency, or any state official acting in his or her official capacity in a suit for damages, since an action against the agency or official is equivalent to a action against the state itself. *Id.* at 11. The Department is a state agency, created by Ind. Code § 28-1-2-1. This is further evidenced by the provisions of § 28-1-2-15,. which allow the members of the Department to fix the salaries for those working in the Department, subject to the approval of the state budget agency and the governor. These salaries are paid out of the financial institutions fund, created by § 28-1-2-4, which is a part of the state treasury. Thus, the Department's actions and the official actions of its employees are considered those of the state. Therefore, the suit for retrospective relief, or damages, against defendants, the Department, Phillips, and Simmonds, must be dismissed as well for the reason that they are not "persons."

prospective relief, such as an order for reinstatement as plaintiff has asked for here, against a state official who has allegedly violated the Fourteenth amendment. *Ex Parte Young*, 209 U.S. 123 (1908); *Kroll v. Board of Trustees*, 934 F.2d at 908. Therefore, the motion to dismiss for lack of subject matter jurisdiction must be denied as to the claim for prospective relief against the individuals in their official capacities. Furthermore, a state official is not protected from a suit for damages in his or her individual capacity, with any recovery to e obtained from his or her personal assets. *Will*, 491 U.S. at 71 n. 10; *Hadi v Horn*, 80 F.2d 779, 782 (7th cir. 1987). The court will now turn to the claims against the individual defendants, Phillips and Simmonds, to determine if those claims should be dismissed or summary judgment granted as to them.

B. Claims Against Individual Defendants

The Supreme Court specifically allows damages to be sought from an individual defendant who, acting under color of state law, has deprived the plaintiff of a constitutional right. *Scheuer v. Rhodes*, 416 U.S. 232 (1973). Plaintiff has sufficiently alleged facts to overcome any assertions by defendants that they were not acting under color of state law. However, a second essential element of a § 1983 action, whether the conduct complained of deprived a person of constitutionally protected rights, privileges or immunities, must also be established. In this case, the court must decide whether plaintiff had a property interest in continued employment with the Department, and if he did, whether he received adequate due process.

A public employee is entitled to due process prior to dismissal when the public employee has a property interest in continued employment. *Board of Regents v. Roth*, 408 U.S. 564 (1972). The public employee may have such an interest despite the lack of a formal contract or tenure. *Perry et al. v. Sindermann*, 408 U.S. 593 (1972). The property interest is

established for purposes of due process if there is a mutually explicit understanding, a state law, or some other rule or regulation which supports the claim of entitlement to the benefit. *Id.*

Plaintiff McCammon claims he has a property interest in his position as an examiner with the Department based on the language of the statute and that his termination by defendants, acting under color of state law, without adequate notice or hearing, violated his due process rights. Plaintiff has alleged conduct by defendants which, taken in the light most favorable to him, would be sufficient to set forth a constitutional violation if plaintiff had a fourteenth amendment property interest in his position as examiner. However, this court finds that plaintiff did not have a constitutionally protected property interest in his position.

No Indiana cases interpret § 28-1-2-15. Cases interpreting other similar statutes, both in Indiana and elsewhere, have found both that the employee did and did not have a property interest in his or her position, *see, e.g.., Bishop v. Wood*, 426 U.S. 341 (1976) (city ordinance providing that a permanent employee could be discharged for certain reasons could be interpreted as either conferring a property right in continued employment or as conditioning an at-will employee' removal on statutory restrictions; the Court followed the latter interpretation, chosen by the district court); *Phegley v. Indiana Department of Highways*, 564 N.E.2d 291 (Ind. Ct. App. 1990) (engineer employed by department was found to be an employee at will where statute allowed demotion or dismissal any time subject to certain statutory restrictions). The language of § 28-1-2-15 does not explicitly state that an examiner of the Department may only be dismissed "for cause." It does provide that an examiner may be dismissed "at any time" for "inefficiency, incompetency, or neglect of or failure to perform their duties" by the members of the Department, rather than the director or the employee's direct supervisor .

A comparison of the statute in this case with the statute in *Phegley* and the one in *Bishop v. Wood* suggests that it falls somewhere between the two. The statute in *Phegley* clearly puts dismissal of employees at the discretion of the director and, while listing acceptable reasons for dismissal, states that such reasons are not limited to those listed, leaving no doubt as to the "at will" status of the employee. In *Bishop v. Wood*, the Supreme Court accepted the interpretation of the district court that the statute in question did not give the employee a property interest in his position but suggested the interpretation could easily have gone the other way. That statute called the plaintiff policeman a "permanent employee" and listed acceptable reasons for dismissal. Because the statute did not explicitly limit dismissal to only those reasons, the district court interpreted the statute as not giving to the policeman a property interest in his employment.

This statute must also therefore be interpreted as not giving the plaintiff employee a property interest in his position. It allows for dismissal at any time with statutory restrictions rather than creating an entitlement to their jobs for the employees it covers. The ordinary meaning of the phrase "at any time" suggests that employees can be dismissed at the discretion of the members. Furthermore, common law considers all employees to be at will. It would be in derogation of common law to interpret the statute as giving plaintiff a property interest in his employment. Legislative deviations from the common law must be expressly declared or unmistakably implied, *Northern Indiana Public Serv. Co. v. Citizens Action Coalition*, 548 N.E.2d 153 (Ind. 1989). This statute does not, as written, expressly declare or unmistakably imply that plaintiff was a permanent employee such that he had a property interest in his position as an examiner. The statute protects employees of the Department from dismissal to the extent that it does not allow their dismissal without the approval of the members of the Department. The members allocated their authority to dismiss

plaintiff to defendant Phillips. Defendants complied with the statute. Therefore, plaintiff did not have a property interest in his position. Thus, plaintiff cannot prove a necessary element of a § 1983 cause of action, that he was deprived of a constitutionally protected property interest. Summary judgment must therefore be granted for defendants.

III. CONCLUSION

For the foregoing reasons, this court will grant the motion to dismiss for lack of subject matter jurisdiction for defendants, the Indiana Department of Financial Institutions and Charles Phillips and John Simmonds, and against plaintiff as to claims for damages against defendants in their official capacities. This court will also grant the motion to dismiss, converted to summary judgment, for defendants Phillips and Simmonds and against plaintiff McCammon as to claims for prospective relief and for damages in their individual capacities, thereby leaving no claims remaining against any of the defendants.

ALL OF WHICH IS ORDERED THIS 24th day of October, 1991.

/s/ John Daniel Tinder, Judge
United States District Court

Supreme Court, U.S.
FILED
JAN 26 1993
OFFICE OF THE CLERK

No. 92-1155

IN THE

Supreme Court of the United States

October Term, 1992

INDIANA DEPARTMENT OF FINANCIAL INSTITUTIONS, CHARLES W. PHILLIPS, as Director of the Indiana Department of Financial Institutions and Individually, and JOHN E. SIMMONDS, as Deputy Director of the Indiana Department of Financial Institutions, and Individually,

Petitioners,

v.

ROBERT L. MILLER, and MARK R. MCCAMMON,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

I. Because the state statute at issue has been replaced, a review of the interpretation of it made by the Court of Appeals would be of minimal importance.

II. The issue in this case was correctly decided below. Petitioners' chief argument is based upon a faulty analysis of case precedent.

ARGUMENT

I. THE ISSUE PRESENTED IS OF NO GENERAL IMPORTANCE.

The issue in this case is whether or not *Indiana Code* 28-1-2-15 gave certain employees a protectible property interest in their continued employment.

Indiana Code 28-1-2-15 was replaced in 1991 by *Indiana Code* 28-11-2-5. Petitioners have argued that the current statute is a change in the law; Respondents believe it is a clarification.

In either case, the new law applies to current employees of the Department of Financial Institutions. Interpretation of the former statute is likely to affect only these parties.

II. THE ISSUE WAS CORRECTLY DECIDED BELOW.

Petitioners rely heavily on the holding of *Phegley v. Indiana Department of Highways,* 564 N.E. 2d 291 (Ind. App., 1990). The statute at issue in *Phegley,* however, differs distinctly from *Indiana Code* 28-1-2-15.

In *Phegley,* the court interpreted *Indiana Code* 8-9.5-4-4. The relevant portion of this statute is as follows:

> (2) cause for demotion, dismissal, discipline, or transfer may include *but is not limited to* failure to satisfactorily effectuate the department's transportation and work programs.

(emphasis added).

By including the language italicized above, the Indiana General Assembly specifically avoided the operation of the legal maxim, "Expressio unius est exclusio alterius." Further, it may fairly be inferred that the legislature understands the operation of this maxim, and is capable of drafting statutory language to avoid it.

The critical language of *Indiana Code* 28-1-2-15 was its last sentence, which read as follows:

> Any of the supervisors, examiners, assistants or employees assigned to or employed in any division of the department may be removed, at any time, by the members with the approval of the governor for inefficiency, incompetency, or neglect of or failure to perform their duties.

The absence of non-limitation language in this statute clearly distinguishes it from the statute interpreted in *Phegley, supra.* Rather, the statute at issue here is more similar to Hammond Ordinance 35-10 which was at issue in *Smulski v. Conley,* 435 F.Supp. 770 (N.D. Ind., 1977).

The relevant language of this ordinance was as follows:

> The board of public works and safety may suspend a policeman without pay, not to exceed thirty days or demote or reduce him in rank for the violation of the written rules and regulations adopted by the board of public works and safety or issued by the police chief.

Smulski, supra, at 773.

The *Smulski* court reasoned that "There would be little sense in setting forth reasons for demotion if the Board of Public Works could choose a reason not enumerated on which to base its determination to take disciplinary action." *Id.,* pp. 773-4.

This reasoning applies equally to *Indiana Code* 28-1-2-15. In fact, the statute and ordinance are of nearly identical construction: [Authority] may [deprivational act] the employee for [brief list of specific reasons].

CONCLUSION

Respondents submit that no special reason exists for granting certiorari in this case. The state statute at issue is no longer in effect, and the interpretation made below was correct. Respondents therefore pray that certiorari not be granted.

Respectfully submitted,
PETER D. MILLER
Attorney for Respondents.